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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 775

CHECKER CAB COMPANY AND ITS MEMBERS, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CHECKER CAB COMPANY AND ITS MEMBERS, *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CHECKER CAB COMPANY AND ITS MEMBERS, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on October 4, 1966.

OPINIONS BELOW

The Labor Board's Decision and Direction of Election in the representation proceeding (R. 2a-15a) is reported at 141 NLRB 583. The Board's Decision and Order in the unfair labor practice proceeding (R. 16a-24a) is reported at 153 NLRB 651. The opinion of the court below (Appendix A, *infra*, pp. A1-A13) has not yet been reported.

JURISDICTION

The judgment of the court below (Appendix B, *infra*, p. A14) was entered on October 4, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

A membership corporation that employed no drivers and that neither owned nor operated any taxicabs was composed of 286 members who did operate taxicabs, either individually or through employees. Each individual owner separately licensed with city and state authorities the cabs he owned, each had final authority to hire and fire drivers, each managed his own cabs, and each separately paid federal income, social security, and withholding taxes, as well as state unemployment taxes, in respect of his own employees. The membership corporation screened prospective employees in order to recommend them to members, maintained a dispatching service, supplied standard forms and driver information booklets, and maintained a board of review composed of members that recommended disciplinary measures and discharge of drivers to the member-employees. The members' claimed status as independent contractors was not questioned either by the Labor Board or by the court below, and there was no history of multi-employer bargaining.

The question presented is whether, in view of Section 2(3) of the National Labor Relations Act as amended, the elements of common operating practices of the membership corporation, which admittedly are insufficient to make the members employees of the corporation, are nonetheless sufficient to empower the Labor Board to constitute the corporation and all of its 286 members into a multi-employer bargaining unit with the necessary consequence that 286 out of the 287 entities in that unit will bargain with individuals who are not their own employees.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act as amended are set forth in Appendix C, *infra*, pp. A15-A16.

STATEMENT

This was a proceeding to enforce an order of the National Labor Relations Act entered in an unfair labor practice proceding that alleged refusal to bargain on the part of petitioners, in which, following the now familiar pattern (*Labor Board* v. *Metropolitan Ins. Co.*, 380 U.S. 438, 439; *Pittsburgh Glass Co.* v. *Labor Board*, 313 U.S. 146, 154; cf. *Boire* v. *Greyhound Corp.*, 376 U.S. 473), the only issue was whether the Board in an earlier representation proceeding had properly held that petitioner Checker Cab Company together with its 286 members, also petitioners here, were an appropriate multi-employer unit to bargain collectively with all of the individual taxicab employees, of all the 286 members, in a situation where Checker Cab Company employed no drivers.

The detailed facts appear both in the Board's Decision and Direction of Election (R. 2a-15a) and in the opinion below (*infra*, pp. A5-A7). For present purposes these may be summarized as follows:

Checker Cab Company (hereinafter "Checker") is a Michigan membership corporation (see *Flueling* v. *Goeringer*, 240 Mich. 372, 215 N.W. 294) that neither owns or operates any cabs nor holds any city or state licenses for cabs. It has 286 members, who operate 900 cabs in the Detroit area and who employ about 7000 full-time and part-time cab drivers. Checker has about 15 employees, none of whom is a cab driver.

Each individual member holds in his own name city and state licenses for each cab in his name, and buys and owns title to his own cabs. Members owning from 1 to 3 cabs are associate members, those owning more than

3 cabs are senior members. Each individual member has final legal authority to hire and fire his own drivers, and manages his cabs either by himself or by agents whom he hires individually. Each member pays federal income taxes on all of the proceeds from his own cabs, each member pays social security taxes and withholding taxes for each of his own driver employees, and each member pays state unemployment compensation taxes.

Checker advertises for, interviews, and investigates drivers, after which it recommends them to its members for employment by them. Checker operates a complete dispatching service, through a central switchboard, a central radio service, and public call stations. Checker's "road men" load cabs and order them to report to designated places for passengers, and Checker supplies both members and drivers with standard forms and standard drivers' manuals.

Checker maintains a board of review composed of senior members that meets weekly to consider complaints against drivers, and which in appropriate cases recommends disciplinary measures and discharge of drivers to the member-employers. There is also a central insurance board that hears complaints against individual drivers in respect of safety violations.

There has been no history whatever of multi-employer bargaining with the drivers employed by the members of Checker.

No single member has a gross income from his cab business of $500,000 a year, but together the 286 members gross about $7,000,000 per year.

On these facts, the Labor Board divided 3-2. The majority held that Checker and its 286 members operated a common enterprise, and that hence Checker and its 286 members constituted an appropriate employer unit to bargain with the 7000-odd full-time and regular part-time

drivers employed by all 286 members. The rationale of the majority decision appears from the following excerpt (R. 6a-7a; *infra*, pp. A2-A3; footnote 6 omitted):

> "It is thus quite apparent that the members of Checker recognize both the need for, and the benefit from, uniformity of control which Checker alone can exercise over all the drivers, and that the members accordingly share control of their drivers with Checker. Thus we in turn are merely recognizing the pattern established by the parties, without in any way changing the manner in which they have subdivided such control as between the individual cab owner and Checker.[5]
>
> "Under all the circumstances, and particularly in view of the facts that the operation of Checker cabs is represented to the public as one integrated enterprise and that Checker is authorized by its members to exercise a substantial degree of control over the drivers of each of its members for this purpose, we find Checker and each of its members to be joint employers in a common enterprise—the operation of Checker cabs—and therefore deem it appropriate to combine the gross revenues of all members for jurisdictional purposes. As these total revenues exceed the retail standard of $500,000 and as legal jurisdiction is present, we find that it will effectuate the policies of the Act to assert jurisdiction herein."

"[5] [Footnote in original.] Our dissenting colleagues concede that Checker is an 'association of independent owner-operators for their mutual advantage.' The dissent, however, concludes that the mutuality of their interest does not extend to labor relations. In view of the extensive evidence set forth above as to the nature and degree of control exercised by Checker over the employees of its members, we are satisfied that mutuality does exist in this area sufficient for our finding that Checker and its members are engaged in a joint venture. Contrary to the dissent, our decision does not purport to establish a 'multiemployer bargaining association.' Having elected to subject their employees to regulation on a joint basis, the employers within Checker must likewise accept the statutory right of their employees to join together for the purposes of collective bargaining."

The two dissenting members voted to dismiss the petition because of the inappropriateness of the employer unit that was sought; they said (R. 13a-15a; *infra*, pp. A4-A5; footnotes omitted):

> "On the issue of jurisdiction, it is clear that none of the individual owner-operators has a gross revenue of $500,000; hence, under established Board standards the petition must be dismissed, unless there is warrant for considering in combination the revenues of the individual owner-operators. The Board has in the past done so when there exists such common ownership and control, including control of labor relations, that separate entities may be considered as a single employer for purposes of the Act. The Board has also considered in combination the business of separate entities when the record discloses the existence of an established or agreed upon multiemployer unit.
>
> "It is patent that this record does not support the assertion of jurisdiction on either of these grounds and our colleagues do not purport so to find. Yet our colleagues, in their determination to assert, have take a hard case and made bad law. Checker and each of its members are found to be joint employers of the employees of such member, even though there is lacking any real employment relationship between Checker and such members' employees. By this hypothesis, there would appear to be as many joint employer relationships as there are members of Checker. The assertion of jurisdiction would then depend on a combination of the commerce facts of an individual member and of Checker. However, no one member and Checker together meet the Board's jurisdictional standards. Here, again, the membership in Checker serves our colleagues' purpose. The fact of such membership is made the basis for a finding that all the members are in relation to one another 'joint employers in a common enterprise.' This legal coinage of our colleagues cannot, however, hide the fact that there is no sound basis whatever for finding that each member is an employer of the employees of every other member. Thus, by a form of legal hopscotch, the individual members who, in combination, are neither a single employer, joint employers, nor a

group organized into an established multiemployer unit, find themselves subject to the Board's jurisdiction on a theory which has no basis in fact or law.

"The vice of all this is further demonstrated by the fact that the majority uses the very same approach in finding a unit of all employees driving Checker cabs to be appropriate. Thus, in disregard of long standing precedent which precludes the establishment of a multiemployer unit in the absence of a multiemployer bargaining history, or agreement as to the appropriateness of such a unit, our colleagues have forced the members of Checker into exactly what they have chosen to avoid, that is, a multiemployer bargaining association.

"In sum, we reject this unwarranted use of the Checker Cab association as an amalgam for joining these independent owner-operators into a pseudo-integrated relationship for purposes of asserting jurisdiction and for unit purposes. This association is no more than an association of independent owner-operators for their mutual advantage; it is not an association for dealing with labor relations. We choose to respect the substance and intent of this mutual arrangement, and we would do so by dismissing the petition."

After petitioners refused to bargain in order to contest the representation issue, an unfair labor practice proceeding followed (R. 16a-26a), and the order resulting therefrom was sought to be enforced in the court below (R. 30a-31a).

It was so enforced, the court below saying (*infra*, p. A13):

"In this case, a group of employers have banded themselves together so as to set up joint machinery for hiring employees, for establishing working rules for employees, for giving operating instructions to employees, for disciplining employees for violation of rules, for disciplining employees for violation of safety regulations. These facts we believe to be 'sufficient indicia of control' to warrant the joint employer finding of the Board."

REASONS FOR GRANTING THE WRIT

If this case were indeed "*sui generis,*" as the court below thought (*infra,* p. A7), the present petition would not have been filed. Nor would review have been requested if, out of a welter of disparate facts, the Board had held the individual members of Checker to be Checker employees rather than independent contractors, and the court below had then under accepted standards found sufficient evidence in the record to support that conclusion.

But here neither the Board nor the court below ever questioned for a minute the status of Checker's members as independent contractors; and, far from being unique, the situation considered in the present record—the association method of providing common services for a group of taxicab owners, each of whom has his own employees—is standard in the industry, to such an extent that perhaps a third of all the taxicabs in the country are so organized.[1]

Thus, not only does the decision below have predictable consequences that are industry-wide in character, but it involves an egregious legal error that circumvents and indeed flouts the 1947 independent contractor amendment to the National Labor Relations Act, in which Congress emphasized that the power of the Board must be exercised in strict conformity with common law concepts of the employer-employee relationship.

For here, without any finding that Checker exercised sufficient control over its members to make them its employees, and without in any sense undertaking to question that the members were, in fact and in law, independent contractors, the Board drew on attenuated elements of

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[1] The figure of one third, based on intensive inquiries, is believed to be correct, although admittedly difficult to verify. Compare *The Taxi Driver,* Washington *Post,* Sunday October 23, 1966, *Potomac* Section, p. 12, where it is said that of the 9400 taxicabs in Washington, only 429 are independents and the balance are divided among 14 cab companies and 51 associations.

common operating practices to conclude that Checker and its members constituted a single enterprise; and, on the basis that they so held themselves out to the public, without any evidence of prior multi-employer bargaining, further concluded that it was therefore appropriate to lump Checker and all of its 286 members into a single bargaining unit—whereby Checker would bargain with over 7000 employees not its own and every member would bargain with the employees of the other 285 members. And the court below sustained that result on the strength of demonstrably inapplicable judicial decisions.

First. In *Labor Board* v. *Hearst Publications*, 322 U.S. 111, 131-132, it was held that newspaper vendors who under common law tests were independent contractors rather than employees could nonetheless be treated by the Board as employees on the footing that "the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act." Thereafter, in 1947, Congress amended Section 2(3) of the Act (29 U.S.C. § 152(3); *infra*, p. A15) to provide specifically that the term "employee" should not include "any individual having the status of an independent contractor," this after the House Labor Committee had denounced the *Hearst* result in mordant if not scathing terms. H.R. Rep. No. 245, 80th Cong., 1st sess., p. 18; set forth because of its importance in Appendix D, pp. A16-A17, *infra*. And, since that time, the courts have given effect to that amendment whenever on the whole record particular individuals in a given situation were, as a matter of law and fact, independent contractors.[2]

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[2] Board orders holding individuals to be employees refused enforcement on ground they were independent contractors: *NLRB* v. *A. S. Abell Co.*, 327 F. 2d 1 (C.A. 4); *Continental Bus System* v. *NLRB*, 325 F. 2d 267 (C.A. 10); *Site Oil Co. of Missouri* v. *NLRB*, 319 F. 2d 86 (C.A. 8); *United Insurance Co. of America*

In the present case, there has not been the slightest suggestion at any stage that (as in *Mound City Yellow Cab Co.*, 132 NLRB 484) Checker's members are employees; they could not be; they are independent contractors by every test. True, in Judge Learned Hand's words (*Radio City Music Hall Corp.* v. *United States*, 135 F. 2d 715, 717 (C.A. 2), "The test lies in the degree to which the principal may intervene to control the details of the agent's performance; and that in the end is all that can be said * * *." Some kinds of control, of course, do not negative independent contractor status; e.g., an individual's control of his barber—or her hairdresser—as to which the discussion in *Taylor* v. *Local No. 7, Journeymen Horseshoers*, 353 F. 2d 593, 598 note 2 (C.A. 4), is illuminating. Suffice it to say that here, where Checker employs no drivers, and where its members hire and fire their drivers and pay all state and federal taxes accruing because of their relationship to the drivers, those members are indubitably independent contractors within Section 2(3) of the Act.

The Board did not suggest the contrary. But, despite the lack of any prior history of multi-employer bargaining, despite the absence of any authorization by the employer-members that Checker bargain with their drivers on their behalf, the Board seized on a few minor aspects of common Checker action on behalf of its members, including screening for employment and recommendations for discipline and discharge—"spiders' webs inadequate to control the dominant facts" (Holmes, J., in *Myers* v.

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v. *NLRB*, 304 F. 2d 86 (C.A. 7); *National Van Lines* v. *NLRB*, 273 F. 2d 402 (C.A. 7); *NLRB* v. *Norma Mining Corp.*, 206 F. 2d 38 (C.A. 4); *NLRB* v. *Steinberg*, 182 F. 2d 850 (C.A. 5).

Board order holding individuals to be independent contractors enforced: *International Bro. Teamsters* v. *NLRB*, 280 F. 2d 665 (D.C. Cir.), certiorari denied, 364 U.S. 892.

Board orders holding individuals to be employees enforced: *NLRB* v. *Air Control Products*, 335 F. 2d 245 (C.A. 5); *NLRB* v. *Lindsay Newspapers*, 315 F. 2d 709 (C.A. 5); *NLRB* v. *Nu-Car Carriers*, 189 F. 2d 756 (C.A. 3), certiorari denied, 342 U.S. 919.

United States, 272 U.S. 52, 177)—to fashion a joint entity, and to create an inflated multi-employer unit of Checker and all its 286 members—literally a monstrosity. This result, apart from all else, runs counter to the rationale of *United States* v. *Silk*, 331 U.S. 704, 712, that neither an independent contractor nor his employees are employees of the entity for which the independent contractor works.[3]

Second. The Board here relied on a species of third-party estoppel, on the fact (R. 7a) that "the operation of Checker cabs is represented to the public as one integrated enterprise," and that (R. 8a) "Checker and its members seek to establish and preserve the public image * * * of a single integrated enterprise." The speciousness of this approach is demonstrated by the newspaper cases; certainly the public looks on the distribution of its daily papers as an integrated enterprise of the publisher; complaints of non-delivery automatically go to the publisher's circulation department; but those facts do not serve since the 1947 amendment to make the newsboys employees of the publisher if in reality they are independent contractors. *NLRB* v. *A. S. Abell Co.*, 327 F. 2d 1 (C.A. 4).

Indeed, it was the decision in a newspaper case (*Labor Board* v. *Hearst Publications*, 322 U.S. 111) that led Congress to overrule that doctrine and to declare that common law tests of the employer-employee relationship should be determinative rather than vague and slippery generalizations, however sonorous, about effectuating the purposes of the Act regardless of its terms.[4] It is not without sig-

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[3] "Obviously the private contractor who undertakes to build at a fixed price or on cost-plus a new plant on specifications is not an employee of the industry thus served nor are his employees."

[4] Interestingly enough, in *International Bro. Teamsters* v. *NLRB*, 280 F. 2d 665 (D.C. Cir.), certiorari denied, 364 U.S. 892, where a Board order finding certain individuals to be independent contractors rather than employees was enforced, the dissent was pitched (p. 667) on "whether or not the Board's order effectuates the purposes of the Taft-Hartley Act."

nificance that, in the related field of social security taxes, payment of which is of course dependent on employee status, where this Court declared in *Bartels* v. *Birmingham*, 332 U.S. 126, 130, that "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service," Congress promptly amended the law to substitute for the "economic reality" test "the usual common-law rules, realistically applied." See discussion, with full references, in *Illinois Tri-Seal Products* v. *United States*, 353 F. 2d 216, 224-229 (C. Cls. Nov. 12, 1965).

The vice of the rulings here sought to be reviewed is that they nullify the plain intent of Congress in adopting the independent contractor amendment in 1947, with its emphasis on the common law standard of the employer-employee relationship (see *infra*, pp. A16-A18), by joining in a single multi-employer bargaining unit the 286 members who have driver employees with Checker which has none. Thus if the decision below stands, 286 out of the 287 employers in the unit will always be bargaining with employees not their own.

Third. Of course the Board has a wide discretion in determining an appropriate unit in multi-employer cases—where the members of the unit are actually employers.[5] But never before, so far as we are aware, has the Board ever declared, in the absence of prior multi-employer bargaining, so large and so plainly unwieldy a unit to be

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[5] In this connection it should be noted that the definition of "enterprise" in § 3(r) of the Fair Labor Standards Act, 29 U.S.C. § 203(r), is far broader and far more comprehensive than that of "employer" in § 2(2) of the National Labor Relations Act (29 U.S.C. § 152(2); *infra*, p. A15). For a recent decision applying the definition of "enterprise" under the first mentioned Act, see *Wirtz* v. *Hardin & Co.*, 253 F. Supp. 579 (N.D. Ala.), affirmed, 359 F. 2d 792 (C.A. 5).

appropriate.[6] Even in the taxicab industry, no other Board ruling so far disregards hitherto accepted standards as this one. In *Terminal System*, 127 NLRB 979, there were 14 employers; in *Jat Transportation Corp.*, 128 NLRB 780, there was a stipulation by the parties that all 65 companies constituted a single employer; and in *City Cab Co. and its Members*, 141 NLRB 1133, there were 58 involved, but the decision simply followed the present one. In the recent New York taxicab dispute (*Cab Operating Corp.*, 153 NLRB 878), the Board held that the 36 employers should bargain separately since there was no history of bargaining on any other basis, distinguishing the present case "inasmuch as the Checker Company exercised a substantial degree of control over the drivers of each of its members and the operation of the Checker Cab was represented to the public as a single integrated enterprise"—considerations we have already shown to be untenable. Finally, *Newark Twentieth Century Taxicab Assn.*, 50 LRRM 1273, involving 180 members, is virtually *contra* to the holding in the present case. For there the Board, dismissing the union's representation petition, held that an association-wide unit of taxicab non-owner drivers was not appropriate for collective bargaining, because the non-owner drivers were not employees of the association,

[6] In each of the following instances the citation is followed by the number of joint employers involved. *NLRB* v. *Lund*, 103 F. 2d 815 (C.A. 8) (two); *NLRB* v. *Condenser Corp.*, 128 F. 2d 67 (C.A. 3) (two); *Butler Bros.* v. *NLRB*, 134 F. 2d 981 (C.A. 7) (two); *NLRB* v. *Long Lake L. Co.*, 138 F. 2d 363 (C.A. 9) (two); *NLRB* v. *New Madrid Mfg. Co.*, 215 F. 2d 908 (C.A. 8) (two); *Terminal System*, 127 NLRB 979 (fourteen); *Frostco Super Save Stores*, 138 NLRB 125 (seventeen); *United Stores*, 138 NLRB 383 (twenty); *Overton Markets*, 142 NLRB 615 (seven); *Red Top Cab & Baggage Co.*, 145 NLRB 1433 (six); *Freda Redmond & Sir James*, 147 NLRB 1025 (five to twenty); *Esgro Anaheim*, 150 NLRB 401 (eight); *Wenatchee Thrifty Drugs*, 151 NLRB 752 (two).

and because the association could not be considered as an employer, since it was not the authorized bargaining representative of its members.

In short, granting the existence of a wide discretion, we submit that, when the Board authorized a multi-employer unit of Checker and its 286 members, to bargain with drivers who were not the employees of 285 out of the 287 "multi-employers," it so far exceeded its discretion, that it acted without authority of law.

Fourth. In sustaining the Board the court below relied on plainly inapposite authorities. Taking them in order, *Waterfront Employers Ass'n of the Pacific Coast*, 71 NLRB 80 (*infra*, p. A10), involved a situation where there had been a prior history of multi-employer bargaining and where all employers concerned had authorized the association to act for them; *NLRB* v. *Lund*, 103 F. 2d 815 (C.A. 8) (*infra*, pp. A10-A12) involved only two employers; while *Labor Board* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261 (*infra*, p. 12) dealt with three.

The conclusory reasons given for its decision by the court below, that (p. A13, *infra*) "a group of employers have banded themselves together so as to set up joint machinery for hiring employees, * * * for disciplining employees for violation of rules, for disciplining employees for violation of safety regulations," not only ignore but indeed flatly contradict the court's earlier factual recitals (*infra*, p. A6, item 5) that "Each individual owner has legal authority to hire and fire the drivers of his cabs" and that (*infra*, p. A7, items 4 and 8) Checker's activities with respect to hiring and firing are advisory only.

And by italicizing, in Section 9(b) of the Act (29 U.S.C. § 159(b); *infra*, p. A16), "Determination of Bargaining Unit by Board," the clause reading "in order to assure to employees the fullest freedom in exercising the rights guar-

anteed by this subchapter'' (*infra*, p. A9), the court below has reverted to the standard of evaluating board action that the Congress specifically disapproved in enacting the 1947 amendment in respect of individual contractors, viz., the "effectuation" of what are considered to be the generalized purposes of the Labor Act through the technique of nullifying the precisely formulated specific terms of that Act.

In short, the court below has not only sanctioned the Board's disregard of the common law tests of the employer-employee relationship that Congress directed be followed, it has found in elements of common operating practices that were insufficient in the aggregate to transform the several members into employees of Checker a basis for sustaining the elephantiasis-infected bargaining unit of Checker plus its 286 members, which must now bargain with some 7000 employees who have no employee relationship whatever with 286 of the 287 employers in that unit.

Moreover, since a substantial number of Checker's 158 associate members (R. 45a-46a)—those owning from one to three cabs (R. 3a, note 2; R. 45a-46a)—are owner-drivers without anyone at all working for them, it follows that many of those who will constitute the hydra-headed multi-employer unit fashioned by the Board in this case are actually not employers at all under any conceivable definition.

CONCLUSION

The result in this case flouts the will of Congress and perverts the scheme of the Act. Its consequences affect an entire industry. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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APPENDIX A

Opinion Below

No. 16722

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

CHECKER CAB COMPANY AND ITS MEMBERS, *Respondents*.

PETITION for Enforcement of an Order of the National Labor Relations Board.

Decided October 4, 1966.

Before: O'SULLIVAN and EDWARDS, Circuit Judges, and MCALLISTER, Senior Circuit Judge.

EDWARDS, Circuit Judge. This petition for enforcement of a National Labor Relations Board order presents an unusual set of facts and a unique NLRB order. A union,[1] after an organizing campaign among drivers of Checker Cabs in Detroit, sought and won an NLRB election. The NLRB ordered the election after finding that the appropriate bargaining unit was all of the regular and part time drivers of Checker Cabs in Detroit. The Checker Cab Co.

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[1] Local 10, Transportation Services and Allied Workers, Seafarers International Union of North America, AFL-CIO.

and its member-owners protested the election principally on the ground that the bargaining unit was inappropriate because it required 286 independent employers of taxi drivers to join in joint collective bargaining where previously there had been no history of such bargaining and where they didn't desire to do so.

The Checker Cab Co. and its members refused to bargain following an NLRB certification of the union.

An unfair labor practice complaint was filed. The proceedings on that complaint were based by stipulation on the record made in the representation proceedings. The NLRB, by a divided three to two vote, found respondents guilty of unfair labor practices and ordered them to bargain with the union on the basis indicated. Respondents continued to refuse to bargain, seeking judicial review of the appropriateness of the bargaining unit (see *N.L.R.B.* v. *KVP Sutherland Paper Co.*, 356 F.2d 671 (C.A. 6, 1966). The NLRB now seeks enforcement of its order in this court.

Respondents contend that 1) the NLRB had no legal authority to define the "employees" as it did and hence that the bargaining unit which it defined was inappropriate. And 2) if it did have legal authority in these premises, that its order was arbitrary and capricious and (presumably) not based upon substantial facts on consideration of the whole record. 3) As an obviously subsidiary question, respondents claim the NLRB should not have assumed jurisdiction because no single member-owner met the $500,000 volume of business which the Board has determined as its standard for assuming jurisdiction in relation to taxicab companies.

The basic finding on the employer issue contained in the majority opinion of the NLRB is:

> "It is thus quite apparent that the members of Checker recognize both the need for, and the benefit

from, uniformity of control which Checker alone can exercise over all the drivers, and that the members accordingly share control of their drivers with Checker. Thus we in turn are merely recognizing the pattern established by the parties, without in any way changing the manner in which they have subdivided such control as between the individual cab owner and Checker.[5]

"Under all the circumstances, and particularly in view of the facts that the operation of Checker cabs is represented to the public as one integrated enterprise and that Checker is authorized by its members to exercise a substantial degree of control over the drivers of each of its members for this purpose, *we find Checker and each of its members to be joint employers in a common enterprise—the operation of Checker cabs* —and therefore deem it appropriate to combine the gross revenues of all members for jurisdictional purposes. As these total revenues exceed the retail standard of $500,000 and as legal jurisdiction is present, we find that it will effectuate the policies of the Act to assert jurisdiction herein." (Emphasis supplied; footnote 6 omitted).

Fn.[5]

"Our dissenting colleagues concede that Checker is an 'association of independent owner-operators for their mutual advantage.' The dissent, however, concludes that the mutuality of their interest does not extend to labor relations. In view of the extensive evidence set forth above as to the nature and degree of control exercised by Checker over the employees of its members, we are satisfied that mutuality does exist in this area sufficient for our finding that Checker and its members are engaged in a joint venture. Contrary to the dissent, our decision does not purport to establish a 'multiemployer bargaining association.' Having elected to subject their employees to regulation on a joint basis, the employers within Checker must likewise accept the statutory right of their employees to join together for the purposes of collective bargaining."

The position of respondents and of the minority of the NLRB is effectively set forth by the dissent:

> "[O]ur colleagues, in their determination to assert, have taken a hard case and made bad law. Checker and each of its members are found to be joint employers of the employees of such member, even though there is lacking any real employment relationship between Checker and such members' employees. By this hypothesis, there would appear to be as many joint employer relationships as there are members of Checker. The assertion of jurisdiction would then depend on a combination of the commerce facts of an individual member and of Checker. However, no one member and Checker together meet the Board's jurisdictional standards. Here, again, the membership in Checker serves our colleagues' purpose. The fact of such membership is made the basis for a finding that all the members are in relation to one another 'joint employers in a common enterprise.' This legal coinage of our colleagues cannot, however, hide the fact that there is no sound basis whatever for finding that each member is an employer of the employees of every other member. Thus, by a form of legal hopscotch, the individual members who, in combination are neither a single employer, joint employers, nor a group organized into an established multiemployer unit, find themselves subject to the Board's jurisdiction on a theory which has no basis in fact or law.
>
> "The vice of all this is further demonstrated by the fact that the majority uses the very same approach in finding a unit of all employees driving Checker cabs to be appropriate. Thus, in disregard of long-standing precedent which precludes the establishment of a multiemployer unit in the absence of a multiemployer bargaining history, or agreement as to the appropriateness of such a unit, our colleagues have forced the mem-

bers of Checker into exactly what they have chosen to avoid, that is, a multiemployer bargaining association.

"In sum, we reject this unwarranted use of the Checker Cab association as an amalgam for joining these independent owner-operators into a pseudo-integrated relationship for purposes of asserting jurisdiction and for unit purposes. The association is no more than an association of independent owner-operators for their mutal advantage; it is not an association for dealing with labor relations. We choose to respect the substance and intent of this mutal arrangement, and we would do so by dismissing the petition." (Footnote omitted)

This is one of those cases where it is easy to agree with either party if only those facts are viewed which the party relies upon.

Having the obligation to make an independent review of the whole record (*Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951)), we present the facts we glean on the dispute here involved, first from the point of view of respondents and then from that of the NLRB. Few if any of these facts are in dispute, but, of course, the parties differ markedly in their interpretation of the weight and significance to be given them.

Facts Tending to Establish 286 Independent Taxicab Owner Employers

1. The Checker Cab Company neither owns or operates any cabs nor holds any city or state licenses for same.

2. Each individual owner holds in his name city licenses for the cabs which he owns.

3. Each individual owner holds in his name licenses from the state for each cab in his name.

4. Each individual owner buys and owns title to his own cabs.

5. Each individual owner has final legal authority to hire and fire the drivers of his cabs.

6. Each individual owner hires an agent or agents to collect from and in effect manage his cabs or performs this function himself.

7. Each individual owner files federal income taxes on all of the proceeds from his own cabs.

8. Each individual owner pays social security taxes for drivers who are employed by him on his own cabs.

9. Each individual owner pays withholding taxes for each of the drivers of his own cabs.

10. Each individual owner pays unemployment compensation taxes to the state.

11. No one of the owners have a gross income from the cab business of $500,000 a year.

Facts Tending to Establish Joint Employer Relationships Between 286 Checker Cab Owners And The Checker Cab Company

1. The Checker Cab Company is a Michigan non-profit corporation which has as members all 286 of the owners of Checker Cabs operating in the Detroit area.

2. Its members operate 900 cabs under the Checker name and employ approximately 7,000 full-time and part-time cab drivers. Together the 286 member-owners gross about $7,000,000 per year.

3. The Checker Cab Company employs approximately 15 people, none of whom are cab drivers. Among the 15 are a personnel manager, an assistant personnel manager, clerical personnel, and "road men."

4. The Checker Cab Company advertises for Checker drivers, requires them to apply at the Checker Cab Company office, where they are interviewed and investigated, and then recommended to individual cabowner employers for employment.

5. Checker Cab Company's "road men" load cabs, order cabs to report to stations to meet trains, or to hotels or meeting places to accomodate public gatherings. They also report infractions of rules by the cab drivers to the supervisors employed by the Checker Cab Company.

6. The Checker Cab Company maintains a central switchboard call system through a single telephone number. Checker also operates public call stations. It also operates a central radio service to dispatch all radio-equipped Checker Cabs. These centralized services operated by the Checker Cab Company account for 20 per cent of all Checker Cab runs during the course of a year.

7. Checker Cab Company also supplies to the owner-members and their drivers a standard driver's manual containing a set of rules for the drivers, a standard information booklet entitled "Things You Should Know," and standard forms for driver leases, for trip sheets and for receipt books.

8. The Checker Cab Company also maintains a board of review composed of senior members which meets every week to consider complaints against the drivers, and which can and does recommend disciplinary measures and discharge of drivers to the owner-employer.

9. Similarly, there is a central insurance board which hears complaints about safety violations against individual Checker Cab drivers.

The recital of these facts leads logically to the assertion that this case is *sui generis*, and that there is no precedent squarely in point.

The National Labor Relations Board cites and relies upon joint employer bargaining orders it approved in *Greyhound Corp.*, 153 N.L.R.B. No. 118 (1965), *Spartan Department Stores*, 140 N.L.R.B. 608 (1963), and *Panther Coal Co., Inc.*, 128 N.L.R.B. 409 (1960). It also cites *Boire* v. *Greyhound Corp.*, 376 U.S. 473 (1964). This last case did not, however, actually approve a joint employer bargaining order; and the facts in the three NLRB cases referred to were considerably clearer examples of unitary control of allegedly independent operations than we deal with herein.

On the other hand, the precedent argued to us by respondents is just as remote from the crucial decision required here. Respondents cite and rely on *Flueling* v. *Goeringer*, 240 Mich. 372 (1927), a Michigan Supreme Court case where that court held that the Checker Cab Company was not engaged in the cab business but was a service organization for the Checker Cab owner-operators. Respondents also cite and rely upon *Hearst Publications, Inc.* v. *N.L.R.B.*, 136 F.2d 608 (C.A. 9 1943), *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944) (dissenting opinion), and the subsequent amendments to the National Labor Relations Act contained in the Taft-Hartley Act, 61 Stat. 137-38 (1947), 29 U.S.C. § 152 (3) (1964). See *N.L.R.B.* v. *Steinberg*, 182 F.2d 850, 854-55 (C.A. 5, 1950); *United Ins. Co. of America* v. *N.L.R.B.*, 304 F.2d 86, 89 (C.A. 7 1962).

It is clear to us, however, that none of these cases or the Taft-Hartley amendments relied upon are close to the central issue here. The Michigan case had no relationship at all to collective bargaining. And the *Hearst* cases and the subsequent Taft-Hartley amendments dealt with the problem of persons alleged to be or found to be independent contractors.

We begin therefore with the statute itself.

The statutory power accorded the NLRB which is currently under consideration is set forth in the National Labor Relations Act in 61 Stat. 137 (1947), 29 U.S.C. § 152(1), (2), (3) (1964); 61 Stat. (1947), 29 U.S.C. § 159(a, (b) (1964):

"§ 152. *Definitions*

"When used in this subchapter—

"(1) The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, . . .

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, . . ."

"§ 159. *Representatives and elections — Exclusive representatives; employees' adjustment of grievances directly with employer.*

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

"(b) Determination of Bargaining Unit by Board

The Board shall decide in each case whether, *in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter,*

> the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: . . ." (Emphasis supplied).

Early in its history the NLRB asserted its power to enter bargaining orders requiring independent employers to bargain jointly against their expressed wishes. In *Waterfront Employers Ass'n of the Pacific Coast*, 71 N.L.R.B. 80, 111 (1946), the Board said:

> "We conclude, therefore, that this Board is empowered by the Act to find multiple-employer units appropriate for the purposes of collective bargaining, and that we may properly exercise that power under the circumstances in this case. We are not persuaded otherwise by the fact that the companies and employer associations have indicated that they do not desire multiple-employer units. To hold in all cases, especially where the employers have themselves acted on a multiple-employer basis, that the Board is precluded in the face of employer opposition from finding a multiple-employer unit to be appropriate, is to permit the employers to shape the bargaining unit at will, notwithstanding the presence of compelling factors, including their own past conduct, decisively negating the position they have taken. Contrary to the mandate given the Board under the Act, such a holding would in effect vest in the hands of the employers rather than the Board the power to determine the appropriate unit for collective bargaining purposes."

The power of the Board in this field was considered by the Eighth Circuit:

> "Obviously all these provisions of the Act place a broad power of discretion, though not one that may be exercised arbitrarily, in the Board for the designation

of an appropriate bargaining unit. In *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 58 S.Ct. 571, 572, 82 L.Ed. 831, 115 A.L.R. 307, three related corporations were involved. The two respondents claimed that the third corporation was the 'employer'. There was only one group of employees. The court said, 'Together, respondents act as employers of those employees * * * and together actively deal with labor relations of these employees.' In *Consolidated Edison Co.* v. *Board, supra,* [305 U.S. 197 (1938)] the order was directed at more than one legal entity. These entities consisted of the consolidated company and its affiliates, together constituting an integrated system. Each affiliated company was nevertheless a separate entity. It was not suggested in that case either by court or counsel that the fact that the employers were separate corporate entities was a fact affecting the jurisdiction of the Board. The inference to be drawn from these decisions of the Supreme Court and from the language of the statute is that, within the meaning of the Act, whoever as or in the capacity of an employer controls the employer-employee relations in an integrated industry is the employer. So interpreted it can make no difference in determining what constitutes an appropriate unit for collective bargaining whether there be two employers of one group of employees or one employer of two groups of employees. Either situation having been established the question of appropriateness depends upon other factors such as unity of interest, common control, dependent operation, sameness in character of work and unity of labor relations. There may be others; but, unless the finding of the Board is clearly arbitrary upon the point, the court is bound by its finding. In the present instance the conclusion of the Board appears reasonable rather than arbitrary,

and its finding is sustained." *N.L.R.B.* v. *Lund*, 103 F.2d 815, 819 (C.A. 8, 1939).

In *Lund* (as shown above) the Eighth Circuit cited and relied upon the Supreme Court's affirmance of a bargaining order addressed to three related corporations as joint employers. *N.L.R.B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938).

We recognize that these cases are hardly similar to our instant facts, and that the Supreme Court citation is at best *dictum*. But these cases (and those that follow) do illustrate the breadth of discretion which the Board has exercised with occasional express or tactit approval in appropriate bargaining unit proceedings. *Greyhound Corp., supra; Spartan Department Stores, supra; Panther Coal Co., Inc., supra.*

Certainly the statutory definition of the words "person" and "employer" and "employee" in 29 U.S.C. § 152(1), (2), and (3) of the NLRA are very broad. These definitions must be read together with the underlined language of 29 U.S.C. § 159(b), "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter. . . ."

We regard these sections as granting power to the NLRB to hold independent employers who have historically chosen to handle jointly such important aspects of their employer-employee relationship as we have set forth above, to be joint employers for the purpose of defining an appropriate bargaining unit under the NRLA.

In *Boire* v. *Greyhound Corp., supra,* the United States Supreme Court, after reciting various facts pointing toward independent employers joint control of certain employees, added this significant sentence:

> "[W]hether Greyhound possessed sufficient indicia of control to be an 'employer' is essentially a factual issue . . ." *Boire* v. *Greyhound Corp., supra* at 481.

In this case, a group of employers have banded themselves together so as to set up joint machinery for hiring employees, for establishing working rules for employees, for giving operating instructions to employees, for disciplining employees for violation of rules, for disciplining employees for violation of safety regulations. These facts we believe to be "sufficient indicia of control" to warrant the joint employer finding of the Board.

On the whole record of this case as we have reviewed and recited it, we have no doubt that there is substantial evidence to support the factual findings of the Board. *Universal Camera Corp.* v. *N.L.R.B., supra.*

The views already expressed indicate, of course, that the Board was within its rules in assuming jurisdiction of this case.

The petition for enforcement is granted.

APPENDIX B

Judgment Below

[Caption omitted; judgment filed October 4, 1966]

BEFORE: O'SULLIVAN and EDWARDS, Circuit Judges, and McALLISTER, Senior Circuit Judge

On petition to enforce an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the petition for enforcement of the order of the National Labor Relations Board be and the same is granted and the order is hereby enforced.

No costs awarded. Rule 23(4).

CARL W. REUSS
Clerk

Entered by order of the Court.

APPENDIX C

Statutes Involved

1. The pertinent portions of Section 2 of the National Labor Relations Act, as amended (29 U.S.C. § 152), provide as follows:

"§ 152. Definitions

"When used in this act—

* * * * *

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual

employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

2. The pertinent portions of Section 9 of the National Labor Relations Act, as amended (29 U.S.C. § 159), provide as follows:

"§ 159. Representatives and elections—Exclusive representatives; employees' adjustment of grievances directly with employer

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

"Determination of bargaining unit by Board

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * * "

APPENDIX D

Committee Reports on the Independent Contractor Amendment Added to the National Labor Relations Act in 1947

1. H.R. Rep. No. 245, 80th Cong., 1st sess., states in pertinent part at p. 18:

"(D) An 'employee,' according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board* v.

Hearst Publications, Inc. (322 U.S. 111 (1944)), the Board expanded the definition of the term 'employee' beyond anything that it ever had included before, and the Supreme Court, relying on the theoretic 'expertness' of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees.' The people the merchants hired to sell the papers were 'employees' of the merchants, but holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there has always been a difference, and a big difference, between 'employees' and 'independent contractors.' 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, normally hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive from the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes 'independent contractors' from the definition of 'employees.'"

2. The conference report on the Labor Management Relations Act 1947, H.R. Rep. No. 510, 80th Cong., 1st sess., states in pertinent part at pp. 32-33:

"(D) The House bill excluded from the definition of 'employee' individuals having the status of independent contractors. Although independent contractors can in no sense be considered to be employees, the Supreme Court in *N.L.R.B.* v. *Hearst Publications, Inc.* (1944), 322 U.S. 111, held that the ordinary tests of the law of agency could be ignored by the Board in determining whether or not particular occupational groups were 'employees' within the meaning of the Labor Act. Consequently it refused to consider the question of whether certain categories of persons whom the Board had deemed to be 'employees' were not in fact and in law really independent contractors.

* * * * * *

"(D) The conference agreement follows the House bill in the matter of persons having the status of independent contractors."

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